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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 386

F. L. McCLANAHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:
WILLIAM P. FONVILLE,
2232 Republic National Bank Building,
Dallas 1, Texas.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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REPLY BRIEF OF PETITIONER

THE ERROR WAS PREJUDICIAL AND NOT CURED

The gist of the Brief of the United States of America in Opposition is that no reversible error occurred when the court instructed the jury on disputed facts that "In determining the guilt of the defendant the willfulness of the act becomes apparent." It argues the conclusion for the reasons that the instruction was a single sentence of a six-sentence paragraph,

explaining how willfulness could be established, in a sequence of five paragraphs explaining that element of the crime; the paragraph in which the statement occurred itself indicated that the decision of whether the defendant's acts were willful was for the jury and could be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act or from the direct evidence of the several acts and general conduct of the parties; and the court instructed the jury (1) that in order to convict, the jury must find from the evidence and believe beyond a reasonable doubt that the defendant did willfully and knowingly attempt to conceal the amount of his income and evade the payment of taxes thereon; (2) that they were the exclusive judges of the facts, of the credibility of the witnesses and of the weight to be given to the testimony; and (3) that if during the trial or from the charge the jury had gathered any impression as to how the court felt about the case or the nature of the verdict to be rendered they would disregard it.

The argument is untenable.

The Court charged the jury (R. 249, 250-251) as follows:

> "The attempt to evade and defeat the tax must be a willful attempt that is to say, it must be made with the intent to keep from the government a tax imposed by law, which it was the duty of the defendant to pay to the government. The attempt must be willful, that is intentionally done with the intent that the government should be defrauded of the tax due from the defendant."
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> * * * * *
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> "In determining the guilt of the defendant, the willfulness of the act becomes apparent. When an act is willfully done it may not always be proved by direct

evidence; it may often be inferred from the conduct of the parties, taking into consideration that the normal mind must realize the probable consequences of his act. Willfulness may be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act. This may be inferred from the direct evidence of the several acts and general conduct of the parties. It may, likewise, be gathered from the circumstances surrounding the acts of the parties. These circumstances may be considered along with any direct evidence.

"Circumstantial evidence is that which relates to a series of other facts than the direct facts in issue, which by experience have been found so associated with that fact in issue that in the relation of cause and effect, they themselves lead to a satisfactory conclusion.

"For instance, if footprints are found in the snow it is proper to infer that some animated being passed over this snow since it fell, and from the form and number of the footprints it can be determined whether they were those of a man, a bird or a quadruped. Such evidence, therefore, is founded upon experience and observed facts as tending to establish a connection between the known and proved facts and those sought to be proved or inferred. Where it becomes necessary to establish the proof of facts by circumstantial evidence only, it is not sufficient to entitle the prosecution to a conviction that the circumstances coincide with, account for, and render probable, the guilt sought to be established, but those circumstances must, together with the other evidence, if any, excluded to a normal certainty, every other hypothesis except that of guilt.

"So now, if you find from the evidence and believe beyond a reasonable doubt that the defendant did, about the time stated in the indictment, file a tax return, as alleged, in which he did wilfully and knowingly attempt to conceal the amount of his income and evade the payment of taxes thereon for the fiscal year ended March

31, 1951, as required by law, then, in that event you may find the defendant guilty.

"In this case, if it appears that the defendant filed an income tax report setting forth a portion of his income, and if you find and believe from the evidence beyond a reasonable doubt that the defendant collected other sums of money and knowingly and willfully failed to include the same in the income tax reported and that his failure or refusal to so include these items was done with the intent of defeating in part the payment of the taxes due by him to the government, this failure to mention such sums will amount to concealment within the law."

The last five paragraphs quoted above are the five consecutive paragraphs which the respondent characterizes as at once including and curing the error; this on the theory that the error of instructing the jury that "In determining the guilt of the defendant the willfulness of the act becomes apparent" was cured in that in those paragraphs the court "fully and carefully explained that element of the crime (Opposition Brief 5)." It will be seen at once that this does not stand scrutiny. The court instructed the jury that a necessary element of the offense was willfulness, that is to say, a willful intent to keep from the government a tax imposed by law which it was the duty of the defendant to pay to the government; that the act must be willful, that is intentionally done with the intent that the government should be defrauded of the tax due from the defendant. Then the court instructed the jury that "In determining the guilt of the defendant the willfulness of the act becomes apparent." The statements contained in the balance of the paragraph, which opened with that devastating instruction, as to how the willfulness could be inferred from the conduct of the parties, on the premises

that the normal mind must realize the probable consequences of his act, and from the circumstances surrounding the acts of the parties, instead of curing the prejudicial effect of the instruction, on the contrary heightened and intensified the harm because the balance of the paragraph and, indeed, the paragraphs on circumstantial evidence which followed, became a powerful, persuasive argument for the validity of the instruction that in determining the guilt of the defendant on the evidence before the jury the willfulness of the act becomes apparent.

When the impact of such instructions is considered it cannot reasonably be said that the harm was cured by instructions that the jurors were the exclusive judges of the facts and were to disregard any impression received by them as to how the court felt about the matter or about the verdict which should be returned. As the Court of Appeals for the District of Columbia said in *Sullivan v. United States, 178 F. 2d 723:*

> "Such statements have little, if any, tendency to undo the harm already done. The influence of the trial judge on the jury is of great weight and his slightest word or intimation is received with deference and may prove controlling. Quercia v. U. S., 1933, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321. That is especially so in a criminal trial. The damaging influence is more likely where conflicting evidence on a crucial issue leaves the outcome close, as it might have been in this case. * * *"

This was not a case where admitted or undisputed facts added up as a matter of law to guilt or to foreclosure of the essential element of willfulness. It has been demonstrated in the petition for the writ that the issues were very

much in dispute and that there was evidence upon which an inference of lack of willful intent might reasonably have been drawn.

The Opposition Brief seems to draw a distinction between the cases cited in the petition for the writ in which the prejudicial statements were intentionally made by the court and the case here where the prejudicial instruction was inadvertently given. This would not seem to be a relevant distinction. Review and reversal are not awarded as punishment to an erring judge but as remedy for prejudicial harm to substantial rights. The fact that the instruction was inadvertent made it no less harmful. The jury heard the court say to them with the dignity of his high office that "In determining the guilt of the defendant the willfulness of the act becomes apparent." They listened attentively then to what became his persuasive exposition as to why this was so on the evidence in this case. They could not have known that the instruction was inadvertent and not intended.

The government adverts to the fact that in the course of its deliberations the jury had the written charge sent in to them. The charge was given to the jury orally in open court. The record discloses what the jury heard. It would be pure speculation to assume that the jury would have read and understood the long charge to vary, alter or supersede the instruction they heard from the bench in open court. Certainly the proposition that a jury will in its deliberations disregard instructions given to them orally from the bench cannot be indulged.

THE ERROR WAS CALLED TO THE ATTENTION OF THE COURT AND NOT WAIVED

The Opposition Brief urges denial of the petition for the writ on the ground that counsel waived criticism of the instruction of which complaint is here made. The brief suggests no formal exception was taken. In this the brief is not accurate. When asked by the court for exceptions of the defendant to the charge, petitioner's counsel (R. 259-260) in stating his exceptions called the court's attention to the fact that the court had inadvertently stated that "In determining the guilt of the defendant the willfulness of the act becomes apparent" and advised the court that he had taken down the statement in shorthand. The error was called to the attention of the court. This was the function of the exception. Perhaps respondent characterizes this as a less than formal exception for the reason that the prejudicial nature of the instruction was not specifically explained. The law does not require a useless thing. It certainly does not require a statement of the obvious. The instruction on disputed facts that "In determining the guilt of the defendant the willfulness of the act becomes apparent" is so clearly prejudicial as to require no demonstration. The respondent suggests that counsel might have requested the court to recall the jury and reread the pertinent portion of the charge. The suggestion overlooks the circumstances wherein the court when the error was called to his attention stated that "Well, it is written 'important', and I think I said it that way" (R. 260). This admitted of no argument. The error was clearly called to the court's attention. It was

of sufficiently serious import for the court in the discharge of the function of his office then and there to have cured the error; the court, not counsel, was in charge of the proceedings. At the conclusion of the defendant's exceptions the court said: "I believe I will leave the charge as it is. I often think when a court wants to reverse a case they can look pretty carefully and find some ground" (R. 262).

The Opposition Brief on this point cites *Johnson v. United States, 318 U. S. 189, 200-201, 63 S. Ct. 826, 87 L. Ed. 704.* The situation there was much different than the one here. In *Johnson* this court declining to exercise its power to notice error to which no exception has been taken refused to notice claimed error in respect to which an exception taken at the trial had been expressly withdrawn thereafter by counsel at the trial and in respect to which when the court stated what charge it would give the jury on the point counsel for the defense stood by and voiced no protest or objection. This Court observed that the fact that the objection did not appear in the motion for new trial or in the assignments of error made it clear that the point was now a "mere afterthought". The situation here is entirely different. The error was clearly called to the court's attention when exceptions to the charge were invited by the court. The court simply did not concede, would clearly not believe, that he could have committed the error. This becomes abundantly clear when the transcript of the proceedings on the motion for new trial on this point are read. These appear at pages 282-287 of the Record. On the

motion for new trial the transcript of the proceedings at the trial had been prepared and filed by the official court reporter and disclosed, as counsel had called to the court's attention at the time, that the court had stated orally to the jury "In determining the guilt of the defendant the willfulness of the act becomes apparent." The court in the face of the official record refused to concede that the error had occurred. The court argued that, despite the record, he could not have made the mistake. Of the prejudicial nature of the error the court appeared to have no doubt for he said (R. 287) : "If I had the least idea that I did use the word, I would grant you a new trial, but I am morally and positively certain that I did not use it." It is clear from this record that the court at the time the exception was taken was not of a mind to concede the possibility that he could have inadvertently used the word "apparent" in the instruction of which complaint was then, was thereafter on motion for new trial and on appeal, and is here made. The court's statement at the time the exception was stated at the conclusion of the charge that he believed he had said "important" instead of "apparent" was a conclusion which admitted of no argument.

The error was prejudicial. It was timely called to the court's attention. The court declined to act to cure the error. Had it not been called to the court's attention it would have been plain error affecting substantial rights to be noticed without exception. How can it tenably be argued then that the error which was called to the court's attention when exceptions were invited is less subject to review?

CONCLUSION

The error was prejudicial. It was timely called to the court's attention. The court had a clear opportunity to cure the error. The court affirmatively declined to do so. The error was not waived. It was not cured by any other portion of the charge. The petition for the writ should be granted.

Respectfully submitted,

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:
WILLIAM P. FONVILLE,
2232 Republic National Bank Building,
Dallas 1, Texas.

PROOF OF SERVICE

I, Irving L. Goldberg, attorney for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of October, 1961, I served copies of the foregoing petition for writ of certiorari on the Respondent United States of America by mailing copies in a duly addressed envelope, with first-class air mail postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington 25, D. C., and by mailing a copy in a duly addressed envelope with first-class postage prepaid to the United States Attorney for the Northern District of Texas, United States Courthouse, Fort Worth, Texas.

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner,
F. L. McClanahan.